Supreme Court, U.S.
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No. 98-1672

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ROBERT E. MEADE,

Petitioner,

v.

PEP BOYS, MANNY, MOE & JACK, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Corrections to Respondents' Statement of Facts

In their opposition to the petition for writ of certiorari, the Respondents, Pep Boys, Manny, Moe & Jack Inc. and Traveler's Indemnity Company have made incorrect statements as well as leave information out to basically confuse the facts and the legal argument. That is why the Petitioner must clarify these statements.

Under their Statement of Facts, the Respondents stated "The Petitioner worked part-time, one weekend afternoon a week, for Pep Boys..". This is not correct. The Petitioner worked at Pep Boys, part-time, for one day a week , which included at least working approximately 9 ½ to 10 ½ hours straight without breaks, lunch, and dinner. In addition, when the manager was away, the Petitioner was required to work Saturday nights plus Sundays. This amounted to far more than the Respondents admitted to the Worker's Compensation Commission so that the Commission would look at it as an "insignificant" amount of hours worked by the Petitioner. The amount of hours can be verified through pay stubs, which the Petitioner would have presented if he had been allowed to be heard by the trial court.

The Respondents then continue to change the wording of the Commission's Order dated March 16, 1994 by stating "and that his alleged disability was not causally connected to his alleged injury". But rather the Order really states "and finds that the back condition is not the result of the alleged accidental injury". The Respondents should have referred to the copy of the Commission's Order that was supplied by the Petitioner in his Petition for Writ of Certiorari. The Commission made its decision without access to causal connection letters and doctor reports from the Petitioner's long-time family physician and other reputable physicians. This was a major error made by the Commission.

The Respondents state that "The case was scheduled for a settlement conference on October 12, 1994, and for trial on July 20, 1995". They failed to mention that the settlement conference was originally scheduled for September 15, 1994

but Haynes, the Respondents' attorney, requested a continuance alleging that he was not properly notified of the settlement conference date. The Court granted the continuance and it was rescheduled for October 12, 1994. On October 12, 1994, the settlement conference took place and the Respondents offered the Petitioner $1,000.00 to settle with a stipulation that he had to resign from Pep Boys immediately . They had refused to return the Petitioner to work until this settlement conference took place. The reason being that they intended to make it one of their demands in the settlement that the Petitioner not return to work at Pep Boys. The $1,000.00 would not have even covered the cost of the medication already used up to October 12, 1994. Petitioner did not accept the settlement because it was ridiculous to offer such a small amount of money for a large amount of prescription and doctor bills that had already been accrued since his injury and will accrue since he is still injured. This was the first settlement offer that Haynes and Jean Miller, of Traveler's Insurance, made to the Petitioner and they considered it as a fair and generous offer.

Once again, the Respondents falsely accuse the Petitioner of deliberate misconduct concerning his continuances which were entirely justified because of medical disabilities in order for them to justify their Motion to Dismiss. As discovery proceeded, the Court granted two continuances to the Petitioner and one to Employer/Insurer. The Employer/Insurer was granted a continuance because of lack of notice. The Petitioner was granted two continuances which were entirely justified because of medical disabilities. One continuance was for the Petitioner who suffered from an accidental mixing of two medications that had adverse effects if taken together.

With respect to the September 5, 1996 conference, as noted by the trial Court, and commanded by Maryland Rule 1-331, "{t}here is no requirement that the plaintiff appear at a pretrial conference unless ordered by a court to be present". Respondents contend that the court's memorandum of August 26, 1996 required the Petitioner to be personally

present at the September 5, 1996 conference. However, the August 26, 1996 memorandum actually refers to two concurrent follow-up conferences: a "settlement conference" and a separate "scheduling conference". The memorandum requires the Petitioner to be present only at the "scheduling conference". Apparently, without any docketed memorandum, the "settlement conference" was re-scheduled for September 5, 1996. However, it was Kiefert's, Petitioner's former attorney, understanding that the Petitioner was not required to be present because the "scheduling conference" was not re-scheduled. The Petitioner was never told he had to personally appear on September 5, 1996 and the Court should be wary of imputing any such obligation on him in view of the apparent confusion of counsel and the ambiguity of the Court's memorandum. He knew nothing about the Court's memorandum and the Petitioner's continuances were entirely justified.

This is not a case involving the type of deliberate and pervasive misconduct required to justify granting a Motion To Dismiss. See Hillig v C.I.R. 916 F 2d at 175.

> "A dismissal with prejudice is a harsh sanction which should not be invoked lightly in view of of sound public policy of deciding cases on their merits; against such policy, district court must balance considerations of sound judicial administration, applying four criteria: degree of personal responsibility on part of plaintiff; amount of prejudice to defendant caused by delay, presence or absence of a drawn out history of deliberately proceeding in a dilatory fashion; and effectiveness of sanctions less drastic than dismissal" Fed. Rules Civil Procedure Rule 41 (b), 28 U.S.C.A.

Regarding what took place on September 5, 1996, the Respondents incorrectly state "The Petitioner's attorney did present to Judge Sothoron, who presided at the conference, a demand letter based on conversations with his client,

indicating terms of settlement that the Petitioner would accept". This is not a correct statement. The Respondents refer to their Apx. 2 which is not a demand letter but instead is a settlement agreement reached without Petitioner's knowledge or approval. The Petitioner's attorney did not present a demand letter to anyone. They further incorrectly state "At the conference, counsel prepared and signed a settlement agreement, which was embodied in an Order of Court, signed by the presiding judge and both counsel". What really occurred, as told to the Petitioner by Judge Sothoron, was that Haynes did all he could to persuade Judge Sothoron to formalize the settlement offer which he and his client, Jean Miller, wanted so that the Petitioner would think it was legally binding on him since it would appear as a formal court order from Judge Sothoron. Judge Sothoron, with the insistence of Haynes, had his secretary write their proposed settlement offer as they were stating it and type the settlement offer of September 5, 1996, which was in the form of a court order and signed by all three, without the Petitioner's knowledge or approval.

The Respondents continue to make incorrect statements. They state, "On September 9, 1996, the case was assigned to Judge Krauser for trial". Throughout the Petitioner's case, Judge Ahalt was actively involved in the Petitioner's case and was assigned to handle the trial. However, on the trial date, Judge Ahalt was presiding over a jury trial that was extending late in the afternoon and, upon suggestion of Haynes to Kiefert, another judge was sought out to hear the case that day. The Respondents go on to state "Counsel for the Petitioner stated that his client had advised him that he was involved in the "Iraq business" and that the Petitioner "can't be here for national security reasons". Kiefert unwisely engaged in an over-colorful extrapolation of the facts that the Petitioner described to him about his work situation.

In addition, the Respondents state "At the expiration of thirty days, having received no indication that the Petitioner accepted the September 5, 1996 settlement agreement, the

Respondents filed a Motion to Dismiss the Petitioner's appeal". This is incorrect. On the evening of September 5, 1996, the Petitioner met with Kiefert and rejected the settlement. On September 6, 1996, the Petitioner, through a friend, informed Judge Sothoron's office that he had rejected the settlement offer.

At the end of their Statement of Facts, the Respondents mention the Motions filed by the Petitioner. The Petitioner filed the Motion to Stay Enforcement of the Mandate in order to give the Court time to answer the Petitioner's Motion To Correct the Record.

Corrections to Respondents' Argument

THIS CASE DOES PRESENT AN ISSUE WHICH IS APPROPRIATE FOR REVIEW BY THIS COURT.

First, the Respondents try to convince the Supreme Court that the Petitioner's Petition for Writ of Certioari was not timely filed. This is not the first time the Respondents have attempted this maneuver. They have also argued this in other stages of appeal. The Petitioner did not "invent a Motion for Reconsideration" as the Respondents falsely state. The Respondents need to be reminded that the Maryland Court of Appeals accepted Petitioner's Motion for Reconsideration. The Petitioner did file his Petition to the Supreme Court timely, within the required ninety (90) days.

The Supreme Court has jurisdiction to issue a writ of certiorari in this matter. The Petitioner's case is a case involving constitutional principles. Therefore, review by this Court is appropriate under 28 U.S.C. § 1257 (a) which allows this Court to review

> "{f}inal judgments or decrees rendered by the highest court of the State in which a decision could be had....where any title, right, privilege, or immunity is specially set up or claimed under the Constitution".

Judge Krauser, by dismissing the Petitioner's case, did not afford him, as an injured worker, due process under the law. Due process is a constitutional mandate which provides that no person shall be "deprived of life, liberty, or property, without due process of law". The fundamental requirement of due process is the opportunity to be heard. It was an error of the Court not to weigh genuine disputes of material facts. These issues could not be resolved by dismissal. Judge Krauser's refusal to listen to anything else the Petitioner had to say was an abuse of discretion. A reviewing court should have applied a "de novo" standard of review of the Workers' Compensation Commission findings and it did not.

The Supreme Court should review the Petitioner's case in light of the structural and procedural errors of the Circuit Court of Maryland. From the beginning, the Circuit Court of Maryland proceeded in a manner unlike other worker's compensation decisions which are presented for review. The Petitioner contends that Haynes, the Respondents lawyer, sought every opportunity to get the court system to deny the Petitioner his day in court where there would be a review of genuine material facts as well as the law. An example of this would be, the Respondents, in their Table of Citations, inject two Maryland Rules 8-303 and 8-603 (d) dealing with procedures in dismissing cases.

At the beginning of the Petitioner's case, Kiefert, filed a Motion for Sanctions against the Respondents for interrogatories and subpoenaed information. The Court never acted on these Motions and Haynes and the Respondents were able to proceed without these sanctions being imposed on them. This resulted in their keeping vital information from the Petitioner which hindered his case. On September 5, 1996, a settlement was signed by Haynes, Kiefert, and Judge Sothoron without the Petitioner's knowledge or approval. As did Haynes previously, he was again trying to have the Petitioner accept an unfair settlement offer. The Petitioner could not accept the settlement offer because it did not include leaving his back injury open and he would have

had to agree not to proceed with other claims against Pep Boys and Traveler's Insurance.

On September 9, 1996, instead of starting the trial, Judge Krauser proceeded to discuss a settlement offer that had already been rejected by the Petitioner because it did not offer him a just settlement. On January 9, 1997, Judge Krauser, instead of allowing the Petitioner to speak and present his settlement offer, denied him the opportunity to be heard. She forced the Petitioner to either accept the settlement negotiated on September 5, 1996, as modified by her, or have his case dismissed. The Petitioner did not accept the settlement and Judge Krauser granted the Respondents' Motion To Dismiss. On May 22, 1997, at a hearing on the Petitioner's Motion To Reconsider, Judge Krauser would not let the Petitioner speak and then denied the Motion. The Court should have allowed him to speak since he appeared pro se. The Petitioner was not able to find any other case that proceeded in this manner.

Judge Krauser, the Circuit Court Judge who heard and decided the Petitioner's case, had the opportunity to sit in on some of the cases in the Court of Special Appeals. She worked on a case at the same time that the Petitioner's case (No. 1562, September Term, 1997) was before the Court of Special Appeals. The reported opinion in the Court of Special Appeals of Maryland of the case Jacklyn Kay Heineman, et al. v. Julie W. Bright, et al. (No. 1557, September Term, 1997) was written by her.

The Supreme Court must decide some important issues in the Petitioner's case. Can we let the courts take away our rights to be heard and reject a settlement if it only benefits the employer, Pep Boys, and the Insurance Co., Traveler's, and not the party who is still injured and still suffering? Does a court have authority to suddenly pull a case away from a jury and force a settlement on its own terms to manage its caseload?

> "When we allow the desire to reduce Court congestion to justify the sacrifice of substantial rights of the litigants in cases like

> this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any Court system worthy of its name". Link v. Wabash Railroad Co. 370 U.S. 626.

The trial court's decision to dismiss the Petitioner's case and the Court of Special Appeals' decision affirming the trial court were both errors. Judge Krauser could have imposed a less drastic sanction on the Petitioner which would have been more appropriate and still allow him to have a jury trial as he had requested from the beginning of his case. It would have been in the interest of justice to allow this case to proceed. There is nothing on record or in Judge Krauser's order to show that she contemplated any sanctions but the most severe one.

Respondents state " In its review of the trial court's decision dismissing Petitioner's case, the Court of Special Appeals of Maryland noted that the case was dismissed based on counsel's inability to prosecute Petitioner's case in light of Petitioner's unexcused absence from court on the day of trial". The Court of Special Appeals does not rely on the circuit court's reason for dismissing the Petitioner's case. Judge Krauser explained to the Petitioner, at a hearing on May 22, 1997, that she had imposed a sanction of dismissal on the Petitioner for not being present on September 9, 1996.

In response to what the Respondents state about what the Court noted concerning Kiefert not being able to prosecute the Petitioner's case, the Petitioner states that Judge Krauser, after denying Kiefert's request for a continuance, should have begun the trial. The Petitioner's presence was not necessary at the beginning of the trial. Kiefert, if given a chance by Judge Krauser, would have begun the trial with items such as asking for sanction hearings on subpoenaed information and interrogatories and arguing for a twelve person jury instead of a six person jury.

Judge Krauser failed to recognize that Kiefert never said that he would not go forward with the case in the Petitioner's absence.

CONCLUSION

For the foregoing reasons, as well as those urged in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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